Office-Supreme Court, U.S.
FILED
Oct 11 1961
JAMES R. BROWNING, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 399.

SHELL OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION, TEXAS GAS TRANSMISSION CORPORATION and LOUISVILLE GAS & ELECTRIC COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF TEXAS GAS TRANSMISSION CORPORATION AND LOUISVILLE GAS & ELECTRIC COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Opinions Below.

The opinion of the Court of Appeals (Appendix A to the Petition) is reported at 292 F. 2d 149. The opinion of this Court reversing a previous decision in favor of Petitioner by the Court of Appeals, and remanding, is reported at 363 U. S. 263*. The order of the Federal Power Com-

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* The previous opinion of the Court of Appeals is reported at 263 F. 2d 223.

mission ("Commission") (R. 2116-25)* appears at 18 F. P. C. 617, 22 P. U. R. 3d 94; its denial of rehearing (R. 2149-54) is reported at 19 F. P. C. 74, 22 P. U. R. 3d 101.

Jurisdiction.

Jurisdiction is invoked by Petitioner under 28 U. S. C. § 1254(1) and § 19(b) of the Natural Gas Act, 15 U. S. C. § 717r(b).

Questions Presented.

Petitioner's version of the "Questions Presented" is based—and depends—on a misstatement of the decision of the Court of Appeals. The Court of Appeals did not, as Petitioner would have this Court believe, resolve the issue before it "on the basis of federal substantive law (which it characterized as 'general contract doctrine', *infra*, p. A-7) rather than on the basis of the law of Louisiana" (Petition, p. 2). What the Court of Appeals did do was to hold that *both* under Louisiana law and under general contract doctrine (which it did *not* confine to, or identify as, "federal substantive law") a 1943 long-term gas purchase contract contained an enforceable method for deter-

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* Record references (other than to the opinion of the Court of Appeals printed as Appendix A to the Petition) are to the pages of the original record before the Commission. Those page numbers are prominently shown in the Joint Appendix in the court below filed with the Petition. Citations to an "Item" refer to certain documents filed with the Commission introduced in evidence through incorporation by reference. "Ex." is used to designate exhibits physically put into evidence. Record references are limited to the place in the record where the document or its pertinent provision appears. Generally, the portions of the record which were printed do not include the transcript page at which the document was offered in evidence.

mining price thereunder for the five-year period from 1953 to 1958.*

The questions presented are:

1. Did the court below err in holding that under Louisiana law (which Petitioner claims is applicable) the 1943 gas purchase contract contained an enforceable method for determining price for the five-year period from 1953 to 1958?

2. If—and only if—the court below erred in holding that the contract contained an enforceable method for determining price under Louisiana law, was Louisiana law applicable or was either the law of another jurisdiction or federal law applicable to the question of enforceability (Petitioner claiming only that the contract was unenforceable under Louisiana law)?

3. Assuming Louisiana law governs, should federal court action be held in abeyance to await a decision (if there ever is one) in an action filed by Petitioner in July 1961 (after the decision below by the Court of Appeals against Petitioner) in the Civil District Court for the Parish of Orleans, State of Louisiana, which action Petitioner states involves the same issue of enforceability decided by the Court of Appeals?**

Statement of the Case.

In its "Statement", as in its "Questions Presented", Petitioner, Shell Oil Company ("Shell"), seeks to create an

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* The Court of Appeals did not—as Petitioner intimates—base its opinion on, nor did it even mention, the fact that the 1943 contract was filed with the Federal Power Commission as a "rate schedule" (Petition, pp. 2, 9-11).

** A fourth question, to which Respondents would address themselves in the event certiorari were granted but believe unnecessary to argue in this brief, is: Even if the 1943 contract were unenforceable, is this material to the case?

issue where there is none—by obfuscation of the decision of the Court of Appeals and of the narrow questions decided by that court. Understandably, Shell has also failed to state what the Supreme Court has already decided in this case—which is the only way of determining what is no longer open to argument. A restatement of the case is therefore necessary.

The ultimate issue in this case is the rate payable under a 1951 contract ("Shell contract") (Item A, R. 227-46) for the sale of gas by Shell, an independent producer of gas, to Texas Gas Transmission Corporation ("Texas Gas")*, an interstate gas pipeline company, which contract was filed with the Commission by Shell as a gas rate schedule as required by the Commission's regulations issued pursuant to the decision of this Court in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672. Shell's contention is that under a favored-nation clause in the Shell contract there was an automatic increase in the stated contract price when price was redetermined in 1954 between Texas Gas and another supplier, The Atlantic Refining Company ("Atlantic"). The order of the Commission, attacked by Shell, determined that the effective rate under the Shell contract was the stated contract price and that a price increase had not been triggered under the favored-nation provision in that contract (R. 2116 *et seq.*).**

The Contracts.

The favored-nation provision in the Shell contract, which was executed in 1951, reads, in pertinent part, as follows:

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* The original party to the Shell contract was a subsidiary of Texas Gas, Louisiana Natural Gas Corporation, which was later merged into Texas Gas. "Texas Gas" will be used throughout this brief to refer to both the parent and subsidiary.

** Texas Gas intervened in these proceedings as the purchaser under the rate schedule and Louisville Gas & Electric Company ("Louisville"), a consumer of Texas Gas, intervened because a decision in favor of Shell would have an adverse effect upon the public served by Louisville.

> "If at any time after December 31, 1951, Buyer shall enter into a contract providing for the purchase by it of gas produced from a field or fields located, and delivered to Buyer, within a radius of fifty (50) miles of any point of delivery provided hereunder, Buyer shall forthwith notify Seller of such fact, and if the price per one thousand (1000) cubic feet at any time payable under such other contract is higher than the price payable hereunder, each price payable hereunder which is less than the price payable at the same time under such other contract shall be immediately increased so that it will equal the price payable under such other contract" (Item A, R. 239-40).

When Texas Gas entered into the Shell contract, it was a party to a gas purchase contract ("Atlantic contract") with Atlantic (Item E, R. 267-79) which had been entered into in 1943 by Defense Plant Corporation, an instrumentality of the United States Government, Texas Gas' assignor.* The Atlantic contract provides for a fixed price during the first five-year period under the contract and, for the remaining four five-year periods, it stipulates that:

> "(b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.

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* Texas Gas purchased the pipeline operated by the Government corporation and on May 11, 1949 became the assignee of the Government's rights and obligations under the Atlantic contract (Item H, R. 287).

"(c) During succeeding five-year periods, prices to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.

"(d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII" (Item E, R. 271).

Condition XII provides as follows for redetermination of price by arbitration in the event that the parties are unable to redetermine price for any five-year period pursuant to the foregoing provisions:

". . . such question or dispute shall be referred for settlement to three arbitrators, one appointed by Seller, one appointed by Buyer, and the third appointed by the two others so chosen. The party desiring such arbitration shall notify the other and in such notice shall name an arbitrator, the arbitrator to be appointed by the other party shall be named within ten (10) days after receipt of such notice of arbitration, and an additional arbitrator shall, within ten (10) days of the appointment of the second arbitrator, be selected by the two (2) arbitrators theretofore appointed, but if one of said parties shall have failed to appoint an arbitrator within the time provided herein, it is expressly understood and agreed that the sole arbitrator shall arbitrate the question alone. If arbitrator[s] shall have been appointed by the respective parties and shall have failed to select the third arbitrator within the above stated time, the third arbitrator shall be appointed by the senior Judge of the 5th Federal Judicial Circuit upon application therefor by either of said parties to the arbitration.

> "The matter in question or dispute shall be submitted in writing to the arbitrators immediately upon the completion of their appointment, and the parties shall do all things necessary to make proper submission thereof according to the character of the question or dispute involved, or as required by the arbitrators. The decision in writing signed by a majority of the arbitrators shall be final and conclusive with respect to the matter submitted and the parties hereto agree to accept and abide by the same." (R. 276-77)

Pursuant to the price redetermination provisions in the Atlantic contract, Texas Gas and Atlantic redetermined the price for the five-year period beginning September 1, 1953 without need of arbitration (Exs. 5-7, R. 124-29). This price was recorded in a brief letter agreement dated February 17, 1954 which specifically stated that such price redetermination was in accordance with the 1943 contract (Ex. 9, R. 132).*

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* The entire text of this letter agreement for the redetermination of price was as follows:

> "Under date of September 1, 1943, Defense Plant Corporation, as Buyer, entered into a gas purchase contract with The Atlantic Refining Company, as Seller, for the purchase of gas produced from Seller's leases in the North Tepetate pool of Acadia Parish, Louisiana, which contract was subsequently amended February 16, 1949. Louisiana Natural Gas Corporation purchased the pipeline operated by Defense Plant Corporation and the aforesaid contract with The Atlantic Refining Company was assigned to Louisiana Natural Gas Corporation.
>
> "In accordance with Paragraph III of said contract, it is hereby agreed that the price to be paid by Louisiana Natural Gas Corporation to The Atlantic Refining Company for gas sold and delivered under such contract between September 1, 1953 and August 31, 1958, both inclusive, shall be 12.2 cents net for each 1,000 cubic feet at a pressure base of 15.025 psia of gas received at the central point or points set forth in the original contract, regardless of whether such gas is delivered to a government plant or not; and, in addition, Buyer shall reimburse Seller for all State severance taxes, or similar taxes, which Seller is obligated to pay and has paid to the State of Louisiana on such gas."

The Decision of the Supreme Court.

The order of the Commission (R. 2116 *et seq.*), determining that the effective rate under the Shell contract was the stated contract price and that no price increase had been triggered under the favored-nation clause, was reversed by the Court of Appeals. 263 F. 2d 223. This Court granted certiorari (361 U. S. 811), unanimously reversed the decision of the Court of Appeals and remanded. 363 U. S. 263.

This Court, in rejecting Shell's arguments, stated *inter alia*:

> "The question to be decided is: did the parties to the Shell contract mean that an agreement of the nature of the Atlantic letter agreement of February 17, 1954, should constitute the 'enter[ing] into a contract [by Texas Gas] providing for the purchase by it of gas . . .'? We first consider the nature of the letter agreement. The pricing provisions of the Atlantic contract specify a price for the first five-year period, and provide that prices for the four succeeding five-year periods should be determined by agreement of the parties, or failing such agreement, by arbitration.[8] In either case the determination is to be made 'after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.'
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> "[8] For purposes of its decision the Court of Appeals 'assumed without deciding that the Atlantic contract of 1943 did in fact impose a binding agreement-to-agree on the price for gas in each of the contract's last four five-year periods.' 263 F. 2d at 226. We proceed on the same assumption in reviewing the interpretation of the 'favored nation' clause in the Shell contract.
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> "Shell urges that the letter agreement is in actuality an entirely new contract which incorporates by inferential reference the terms of the 1943 contract. There is nothing in the letter agreement or otherwise in the record to substantiate this con-

tention. On the contrary, the letter agreement affirmatively states that the action was taken 'in accordance with' the 1943 contract.[9]

"[9] [The Supreme Court's footnote omitted.]

• • • • • •

". . . 'enter[ing] into a contract providing for the purchase of gas' meant to the parties the making of a full-fledged contract containing all the terms defining the complete relationship.

"• • • In deciding which increases do and which do not trigger this 'favored nation' clause we would be making an irrational distinction were we to focus upon the mechanics chosen in the Atlantic contract and conclude that the Shell clause was activated by a post-1951 price determination under the Atlantic contract, although it would not have been activated by price increases pursuant to a more mathematically precise formula. In its essential respects the Atlantic price adjustment was no different from the latter, for the Atlantic adjustment was required under a pre-existing contract, and Texas Gas was powerless to prevent it.

"We therefore hold that the Court of Appeals erred in its interpretation of the 'favored nation' clause and that the Commission correctly construed it as not effecting an increase in price by reason of the letter agreement." (363 U. S. at 270-76).

This Court remanded to the Court of Appeals solely to give that court an opportunity to consider one of Shell's arguments which the Court of Appeals had stated in its opinion it found unnecessary to consider because of the rationale which it adopted. This was the argument "that when the second five-year period [under the Atlantic contract] came to an end on August 31, 1953, neither Atlantic

nor Texas Gas was under *any** enforceable obligation to continue the prior relationship and therefore when on February 17, 1954, Texas Gas signed the letter agreement it was not acting pursuant to *any* pre-existing obligation" (363 U. S. at 276). This Court stated, however, that the Court of Appeals should address itself to this argument only if it first found the argument to be material to the case.**

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* Wherever italicization appears in a quotation in this brief, it has been added.

** The following is the full opinion of this Court [with footnotes omitted] respecting the remand:

> "There remains for mention an argument of Shell which the Court of Appeals found unnecessary to consider because of the rationale which it adopted. This is the contention that the 1943 Atlantic agreement did not provide for a fixed and determined price beyond the first five-year period, so that under applicable state law enforceability was suspended until the contract price for a particular succeeding five-year term was supplied by agreement or arbitration. From this premise it is argued that when the second five-year period came to an end on August 31, 1953, neither Atlantic nor Texas Gas was under any enforceable obligation to continue the prior relationship and therefore when on February 17, 1954, Texas Gas signed the letter agreement it was not acting pursuant to any pre-existing obligation but was exercising its free choice to enter what was in effect a new contract. In its petition for writ of certiorari the Commission argued that not only was there no doubt about the enforceability of the Atlantic contract but that the issue is immaterial because the parties to that contract treated the contract as binding and that it is not for Shell, a stranger to the contract, to say that it was not legally enforceable. However, the Commission suggested that should we reverse the decision of the Court of Appeals, premised as it is upon the assumption that the 1943 Atlantic contract imposed a binding obligation for its entire stated term, and if we considered the question of enforceability to be material, we should remand the issue of enforceability to the Court of Appeals for its decision. Shell has maintained in this Court that the issue of enforceability is material but, in view of the Commission's statement, has argued neither that issue nor the issue of enforceability. We agree that it is appropriate that the Court of Appeals address itself to the enforceability issue, if it is material, but under the circumstances we think the Court of Appeals should first decide

The Decision of the Court of Appeals.

Acting under the terms of the remand by the Supreme Court, the Court of Appeals decided, first, that the enforceability issue was material (Petition, p. A-2). The Court of Appeals then held that the Atlantic contract was enforceable—*under contract law generally and under Louisiana law specifically.* It found that the contract "does contain a valid, workable price-fixing standard" and "the definite procedure and obligation to accede to it by which the needed prices are to be fixed" (Petition, p. A-7). In view of this holding, the court decided that it was unnecessary to indulge in an "abstract discussion" of conflicts of law. The court stated:

> "Much is said in the case on the question of whether Louisiana law governs enforceability of the contract but under our conception of the controverted document, Louisiana law, in this instance at least, does not differ from general contract doctrine. Therefore, abstract discussion of whether Louisiana law controls the enforceability of the Atlantic pact is not called for. Circumstances considered, *the Atlantic-Texas Gas agreement does contain a valid, workable price-fixing standard. We would be ignoring this and descend to quibbling were we to hold otherwise.*" (Petition, p. A-7).

In reaching its conclusion, the Court of Appeals pointed out that the 25-year continuity of the 1943 Atlantic contract, "a full dress instrument", is clearly expressed.

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the question of materiality. We therefore reverse the judgment of the Court of Appeals and remand for further proceedings consistent with this opinion." (363 U. S. at 276-77)

The contract's "intent to have binding prices for the indicated gas throughout its term is evident." (Petition, p. A-5).

The Court of Appeals then turned to the arbitration clause in the Atlantic contract as the mechanism by which the contract is made enforceable for the second and subsequent five-year periods thereunder. The court stated that the intent of the parties was "plainly that if arbitration be necessary to arrive at a price the prescribed method will produce the contemplated price. And the mechanics of the stated procedure follow through acceptably to that end." (Petition p. A-6).

The court below noted, first, "*that the certainty of arbitration is properly conceded by Shell*" (Petition, p. A-5). There being no question as to the enforceability of the arbitration clause, the court next described the arbitration procedures established by that clause—procedures which make it impossible for any one party to prevent or defeat arbitration (Petition, pp. A-5, A-6). Finally, the court noted that the decision of the arbitrators is expressly made "final and conclusive" and binding upon the parties (Petition, p. A-6). In accordance with the intent of the parties to the contract, "there is present the definite procedure and obligation to accede to it by which the needed prices are to be fixed" (Petition, p. A-7).

ARGUMENT.

I.

Because this case presents no question of general importance, Petitioner misstates the decision below and asks this Court to pass upon a specious issue.

When this case was previously before this Court, there was presented by the Commission, Texas Gas and Louisville an important question of the scope of review of federal administrative determinations. This Court, while determining that the scope of review question need not be reached because the Commission had decided the case on principles of general contract law, nevertheless made it clear that the motivating force for granting certiorari was the administrative law question and not the contract law questions.* In its present posture, not only does this case not present any question of administrative law or other question of general importance, but the case is presented after a remand by this Court on the very narrow question of the enforceability of a subsidiary contract. Considering the purely commercial nature of this private dispute between Shell and Texas Gas** and considering the fact as

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*The Court stated: "We granted the separate petitions for certiorari . . . being particularly moved to do so by the contention made in both petitions that the Court of Appeals exceeded the appropriate scope of judicial review of the Commission's determination." 363 U. S. at 268.

**Despite the fact that an administrative law question involving administrative expertise was presented to this Court in the prior petitions in this case, it was Shell's position in opposing the grant of certiorari that:

> ". . . [T]his is not a case of general importance but, in reality, is nothing more than a contract dispute between Shell and Texas Gas involving a privately negotiated contract in a unique situation which has already been to the

[continued on next page]

quoted by the court below that "the certainty of arbitration is properly conceded by Shell" (Petition, p. A-5), it is apparent that there is no question presented here which merits the attention of this Court.

In mute recognition that the decision below raises no issue which merits the attention of this Court, Shell has sought to fabricate an issue by misstating the opinion below—and now urges this fabricated issue as its main argument for the grant of certiorari.

Shell states:

> "The decision below stands as authority for the proposition that federal substantive law, or some nebulous general common law, rather than the law of the State of performance, governs the enforceability of a contract on file with the Commission as a rate schedule. This precise issue—although of far-reaching importance—has not been, but should be, resolved by this Court." (Petition, p. 11).

In fact, the decision below stands for no such authority and raises no such issue. The court below held that under Louisiana law specifically and under contract law generally the 1943 Atlantic contract contained an enforceable method for determining price for the five-year period from 1953 to 1958 (see pp. 11-12, *supra*). The court below never mentioned federal substantive law. Indeed, the court below never mentioned—because it was irrelevant to its opinion—that the Atlantic contract was on file with the Commission as a rate schedule.

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decisional level three times and in which Texas Gas, with the aid of the Commission, is merely seeking another decision more to its liking." (Brief in Opposition, Nos. 167 and 170, October Term 1959, pp. 17-18).

Since no administrative law question is now involved, these words are truly applicable to Shell's present petition.

Significantly, the only contentions which Petitioner (and *not* the Court of Appeals) cites—and attempts to refute—for the applicability of federal law have nothing to do with the fact that the Atlantic contract was filed with the Commission as a rate schedule, but relate, instead, to the particular terms and circumstances of that contract: (1) the contention that the Federal Arbitration Act is applicable to the enforceability of the arbitration clause and (2) the contention that federal law is applicable because the original party to the Atlantic contract was a federal agency which assigned its rights under the contract to Texas Gas (Petition, pp. 10-11, fns. 6, 7). See pp. 26-28, *infra*.

Respondents have always contended that regardless of what law governed—whether Louisiana law, whether the law of some other state, or whether federal law—the Atlantic contract was unquestionably binding as to the five-year period starting in 1953—particularly in light of the conceded enforceability of the arbitration clause. This is also the clear holding of the Court of Appeals.

II.

Assuming Louisiana law governs, the court below correctly applied that law to the issue of enforceability.

Shell, in its futile attempt to find some conflict between Louisiana law and the decision below, persists in arguing issues which are not germane to the decision below or to the issue remanded by this Court. The issue is not whether the Atlantic contract was effective as a "sale" under Louisiana law (Petition, pp. 13-21). The only issue (other than materiality) before the Court of Appeals was whether

Texas Gas or Atlantic was under "any enforceable obligation to continue the prior relationship" at the end of the second five-year term or whether Texas Gas was "acting pursuant to *any* pre-existing obligation" in redetermining price under the Atlantic contract. 363 U. S. at 276. If the 1943 Atlantic contract contained an enforceable price-fixing mechanism applicable to the 1953-1958 period, Shell must lose. Every other issue in the case has already been decided adversely to Shell by the opinion of this Court.

The existence of an "enforceable obligation to continue the prior relationship" of the parties at the end of the second five-year period of the Atlantic contract is readily demonstrated by Shell's concession as to the enforceability of the arbitration clause and by those parts of Shell's own Louisiana authorities which it persists in ignoring.

Shell does not dispute the enforceability of the Atlantic arbitration clause under Louisiana or any other law; indeed, it has conceded it (Petition, p. A-5). See La. Civil Code, Art. 2465. With this concession of enforceability, given the nature of the arbitration clause and its context, there is nothing left for Shell to argue under the law of any jurisdiction. Shell's only answer to this is the following *non-sequitur:*

> "Neither a purported sale nor a purported contract to sell is enforceable or of any legal effect [under Louisiana law] until the price is fixed, *and that is true even though the contract contains an enforceable arbitration clause.*" (Petition, p. 13)

What Shell chooses to ignore, among other things, is that when it grants—as it must—the enforceability of the arbitration clause, it concedes what is here at issue: an enforceable method of fixing price under the 1943 Atlantic contract and an "enforceable obligation [of the parties] to continue

the prior relationship" (363 U. S. at 276) at the expiration of the contract's second five-year term.

This is made doubly clear both by the pricing provisions of the Atlantic contract in general and by the specific provisions of the arbitration clause in particular. The arbitration clause is one of the many provisions of the 1943 Atlantic contract designed to the common end of providing for continuity of supply of gas over the life of the entire contract. In carrying out the objective of ensuring a firm long-term commitment to sell and purchase gas, the price provisions in the Atlantic contract make it dead certain that neither party has the right or power to prevent the price from being determined.

After the first five years, the contract specifically provides a mechanism to insure that price will be determined, the terms of which are mandatory and not optional. The contract first states that "Buyer agrees to pay *for the gas received hereunder a price computed as follows:*"— and then goes on to provide in mandatory terms that for the second five-year period the parties "*are* to reach an agreement as to the price for gas sold and delivered *under this contract*", and that "The price • • • *is to be* agreed upon at the beginning of such period *after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.*" For succeeding five-year periods, "prices to be paid *will be determined* at the beginning of each period in the same manner" (Item E, R. 270-71).

The pricing provisions of the 1943 Atlantic contract do not stop at the requirement that the parties "are to reach agreement". To forestall any possibility of an impasse at that point, the Atlantic contract goes on to impose a bilateral obligation requiring that, if the parties are unable to agree, "*such determination shall be submitted to arbitra-*

tion'' in accordance with the well-drawn and self-operating arbitration provision (Item E, R. 271, 276-77).

Under the arbitration procedure, each party is to appoint an arbitrator. If either party fails to do so within a specified time, the arbitrator appointed by the other party *''shall arbitrate the question alone''*. The two arbitrators selected by the parties *''shall''* appoint a third arbitrator. If they fail to do so within a specified time, the third arbitrator ''shall be appointed'' by the senior Judge of the Fifth Circuit upon application of either party. Neither party, by act or omission to act, can halt or frustrate the arbitration proceeding. (Item E, R. 276.)

The intention to be bound by the arbitration machinery is also reflected in the following provisions:

> ''The matter in question or dispute *shall be* submitted in writing to the arbitrators immediately upon the completion of their appointment, and the parties *shall do all things necessary to make proper submission thereof* according to the character of the question or dispute involved, *or as required by the arbitrators.* The decision in writing signed by a majority of the arbitrators *shall be final and conclusive* with respect to the matter submitted *and the parties hereto agree to accept and abide* by the same'' (Item E, R. 276-77).

Furthermore, the Atlantic contract supplies a method of insuring continuity even when the price may be in dispute—such as during the period while the price-fixing mechanism is in operation. It provides that ''Buyer shall not be considered to be in default hereunder if, in case of a bona fide dispute with respect to any portion of its bill, payment of the portion thereof not in dispute is made'' (Item E, R. 275).

All this is ignored by Shell. Instead, Shell resorts to an exercise in obfuscation as to Louisiana law—none of which has anything to do with the fact that the concededly enforceable arbitration clause demands an affirmative answer to the question on which the Court of Appeals was passing: Was Atlantic or Texas Gas under "*any* enforceable obligation to continue the prior relationship" at the end of the second five-year period under the contract?

For the most part, Shell argues the irrelevant question whether under Louisiana law the 1943 Atlantic contract was effective as a "sale" (or "contract of sale", which means "sale" under Louisiana law) prior to the fixing of price or whether under a "contract to sell" the remedy of specific performance is available prior to the fixing of price or the meeting of some other condition (Petition, pp. 13-21). It is with this that the quoted passages of Shell's statutory and other authorities deal—not with the question of the enforceability of the price-fixing mechanism in the 1943 Atlantic contract.

The very authorities on which Shell itself relies—in passages which Shell fails to quote—demonstrate that under Louisiana law the Atlantic arbitration provisions would be held to be fully binding and that, therefore, the 1943 Atlantic contract to sell would continue to be binding. The law review article on which Shell places the greatest weight, Hebert and Lazarus, *Some Problems Regarding Price in the Louisiana Law of Sales*, 4 La. L. Rev. 378 (1942), expressly makes this clear. In a part of that article which Shell never refers to it is stated:

> "It is true that one of the parties may refuse to comply with his obligation of appointing the estimator and thus has it within his power to nullify the agreement; but the contract is nonetheless binding, *even though it cannot be effective as a sale*

> until and unless the parties have named the arbitrators and they have fixed the price. That the contract is ineffective if the parties only agree to designate the experts afterwards, is true only to the extent that there is no sale. *However, the contract is binding upon the parties to the extent that should either one refuse to comply with his obligation to appoint the appraiser, which is an obligation to do, he will subject himself to damages for the breach thereof.*
>
> "The rule announced in the *Werner* case should therefore be qualified by the foregoing. What was evidently intended was that the sale was unenforceable as such, *but that the obligation to name the experts was nevertheless binding*" (4 La. L. Rev. at 400-01; see also pp. 380, 385, 387, 412, 418).*

Of course, the rule referred to in this law review article would apply *a fortiori* to the self-executing terms contained in the Atlantic arbitration provision, under which the parties specifically eliminated any need to seek judicial assistance or vindication in the process of appointing the arbitrators. This is shown in the case of *Lake* v. *LeJeune*, 226 La. 48, 74 So. 2d 899 (1954), which is cited by Shell (Petition, p. 21). In the *Lake* case, the court clearly stated that the touchstone for judicial enforcement of a provision for the appointment of appraisers was whether or not "any one of the [parties] has the power to refuse to appoint." See 74 So. 2d at 901-02.** Since the Atlantic arbitration

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* To the same effect: Comment, *Certainty of Promise in the Law of Sale*, 30 Tul. L. Rev. 568, 569-70 (1956); Smith, *Civil Code and Related Subjects (Particular Contracts)*, 16 La. L. Rev. 242, 243 (1956).

** The *Lake* case involved an action for specific enforcement where the plaintiff was seeking to obtain title to real property. For the reasons stated above, the Atlantic contract would be specifically enforced to the extent necessary. Moreover, even when Louisiana courts would not decree that particular remedy, they

provision specifically prevents either party from having "the power to refuse to appoint", that provision meets the requirements of the *Lake* case.*

There is nothing mysterious or peculiar to the law of Louisiana about this test or this result. In Louisiana, as elsewhere, the Atlantic arbitration machinery is enforceable because its self-executing provisions effectively remove fixing of price from the whim, caprice or control of the parties. See Hebert and Lazarus, *supra,* 4 La. L. Rev. at 410, 412, 418. However, Shell's argument essentially is that a price arbitration provision must be immune from every possibility of frustration, even though beyond the control of the parties (Petition, pp. 15-16). This extreme contention is wholly at war with the classic and universal test that a promise is obligatory when, as Hebert and Lazarus recognize, it is independent of the whim or caprice of the parties.

It is, of course, true that if *neither* party appointed an arbitrator, there would be no arbitration (Petition, pp. 15-16). But this is no different from stating that both parties to a contract may, by agreement, abrogate or terminate its provisions. Until the contract is terminated or abrogated by agreement of both parties, however, the contract continues as a valid and binding instrument.

Shell, though not disputing that at least the arbitration clause in the Atlantic contract is enforceable, raises the

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will enforce agreements to arbitrate by way of damages. See Smith, *Civil Code and Related Subjects (Particular Contracts),* 16 La. L. Rev. 242 (1956); see also the passage quoted at pp. 19-20, *supra,* from the Hebert and Lazarus article.

* Shell wholly misstates the *Lake* case as involving a provision whereby "either party alone could designate the appraisers" (Petition, p. 21). It is crystal-clear that that case did not involve a provision where each party had the separate and independent right to name the sole arbitrator in the event that the other party refused to name one. Otherwise, the court would not have said that "any one of the [parties] has the power to refuse to appoint."

entirely false issue, by confusing sales and contracts to sell, of whether there is still something wrong with the contract under Louisiana law. Its whole premise is that, if there is a "suspensive" condition to the sale, the Louisiana courts somehow would not enforce any part of the 1943 Atlantic contract—even though they would enforce the price-fixing mechanism (Petition, pp. 13, 15, 18, 20-21, A-5). Apart from the fact that this is obviously a contradiction, Shell misses the whole point that, even though there may be a "condition" of some kind to the sale of gas under the Atlantic contract for subsequent five-year periods,* the condition itself in this case is fully obligatory (which indeed Shell admits when it concedes that arbitration is enforceable) and therefore does not affect the obligatory nature of the contract to sell. See Comment, *Certainty of Promise in the Law of Sale*, 30 Tul. L. Rev. 568, 569-70 (1956).

Shell's self-contradictory argument as to Louisiana law, based on the confusion of "sale" and "contract to sell", is not only irrelevant to the issue decided by the Court of Appeals; it is also expressly contradicted by the Louisiana authorities. It is contradicted not only by the already quoted passage from the Hebert and Lazarus article, upon which Shell relies so heavily,** but also, *inter alia*, by the

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* Actually, due to the nature of the 1943 Atlantic contract, sales would continue and title would pass even during arbitration or price renegotiation. Among other things, there is provision for interim payment of the amount not in dispute so as to ensure an uninterrupted flow of gas (Item E, R. 275).

** Oddly enough, Shell itself points out the difference between a "sale" and a contract or promise "to sell", and also notes that "contract *of* sale" is used in Louisiana to mean a "sale" (see Petition, pp. 13-14). Due to this usage, many references in the Louisiana cases to "contract" relate only to the "sale" and not to the "contract to sell". The whole piece of glue with which Shell seeks to put together its argument that "sale" and "contract to sell" may be used interchangeably is a footnote in the Hebert and Lazarus law review article, in which the authors state that a contract to sell in the future and a contract of a present sale are

following Louisiana authorities, including the *Barber Asphalt* case which is the principal decision cited by Shell (Petition, pp. 17-19):

> "If it was a sale, it would transfer the ownership; *because a sale is a transfer of ownership, and it is nothing else.* • • • When a sale is made under a suspensive condition, there is no sale until the condition has been fulfilled. There is merely *a contract that there shall be a sale* when the condition is fulfilled." *Barber Asphalt Paving Co.* v. *St. Louis Cypress Company,* 121 La. 142, 46 So. 193, 197 (1908).

> *"But the perfection of the contract so as to fix responsibility of the parties to it, in the event of its final execution or non-execution, is one thing, while the actual passing of the title of the thing, the object of the contract, under conditions suspensive in their nature, is another."* *Hamilton Co.* v. *Medical Arts Bldg. Co.,* 135 So. 94, 96-97 (La. App. 1931).

> "It may be that a contract by which property is acquired for a consideration to be paid in money may (technically considered) not be a sale as defined by the Code, *but it does not necessarily follow that such a contract is void because it cannot be classed as a sale."* *Union Tank Car Co.* v. *Louisiana Oil Refining Corp.,* 178 La. 940, 152 So. 571, 572 (1933).

See also Note, *Specific Performance—Sale and Contract to Sell Distinguished,* 4 La. L. Rev. 634, 636-37 (1942).•

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governed by the same rules (see Petition, p. 13, n. 9; see 4 La. L. Rev. at 381, n. 15). However, the article itself shows that the authors did not mean what Shell says, and contradicts the whole thesis of Shell's argument, because it makes the very distinction which Shell seeks to avoid. This is shown in the passages which Shell omits (see pp. 19-20, *supra*).

• The differences which Shell persistently ignores are made plain in an article of the Louisiana Code which Shell quotes (Petition, p. 14), Article 2462, which merely provides that a "promise to sell" so far amounts to a "sale" giving the right to "specific

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III.

Shell's request that this case be held in abeyance pending a decision (if any) in an action in a Louisiana court commenced by Shell after the decision below is wholly without merit.

Finding no conflict between the decision of the court below and the decision of any Louisiana court, Shell urges this Court to hold the entire case in abeyance because, Shell claims, there is a chance of a Louisiana court in the future "possibly arriving at a contrary conclusion" (Petition, p. 22). In support of this strange argument, Shell states that, *after the adverse decision of the court below,* it commenced an action in the Civil District Court for the Parish of Orleans, State of Louisiana, wherein the issue here involved "will be among those" to which the state court will apply Louisiana law (Petition, pp. 21-22).

This argument is on its face so preposterous that we can scarcely believe that Shell advances it seriously. Shell cannot wish into being a conflicting Louisiana decision which does not exist. The bringing of an action in a Louisiana

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performance" when there is consent to the price. In any jurisdiction, the distinction between a sale and the contract to sell is most fundamental. See, e.g., 23 Halsbury, *Laws of England, Sale of Goods* §§12, 13 (3d ed. 1960), and the Note of the Commissioners on Uniform State Laws under §1 of the Uniform Sales Act. The obligatory nature of conditions is brought out in the articles of the Louisiana Code, specifying "casual", "mixed" and "potestative" conditions (Arts. 2022-25, 2034-35). A "suspensive" condition merely holds up transfer of title (Arts. 2471 and 2043). Even a "potestative" condition, which is in the control of one of the parties, is binding when there is a duty to fulfill it. See Art. 2035; *Stephen L. Guice & Co.* v. *Perkowski,* 12 So. 2d 692, 695 (La. App. 1943). Thus, conditions attach to performance or consequences and do not prevent a contract from being binding. See 3 Williston, *Contracts* §666 (rev. ed. 1936) ("What it is which conditions qualify").

court by Shell, after Shell lost in the court below, does not change this fact. Were this not so, every party, *after* litigating a case in the federal courts and *after* losing before the Court of Appeals on a question of state law, would be encouraged to commence an action in the state courts and then apply to this Court to stay federal court proceedings while the matter is relitigated in a state court.

While nothing more need be said on this point, it may be noted that not only is there no decision by the Louisiana court—there could, if this case were stayed, be no assurance that there would be a decision or as to the grounds for any decision. One thing, however, appears certain and that is that there would be no conflicting decision. Louisiana law is clear on the question here at issue—despite Shell's attempt to confuse that question and to make Louisiana law sound both complex and illogical (see pp. 15-23, *supra*).

Even in a case—unlike this one—where there is a real possibility of a serious conflict between state and federal courts and where the matter of state law is novel and difficult, the federal courts do not hesitate to reach a decision. This is made amply clear by the decision of this Court in *Propper* v. *Clark,* 337 U. S. 472, 489-92. After analyzing the whole problem of references to state courts, this Court stated that "in the absence of special circumstances", the submission of issues to a state court "is not to be used to impede the normal course of action where federal courts have been granted jurisdiction of the controversy" (337 U. S. at 492).*

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* The case of *Thompson* v. *Magnolia,* 309 U. S. 478, cited by Shell (Petition, pp. 23-24), is wholly inapplicable. In the *Magnolia* case, unlike here there was a conflict between the Eighth Circuit and the Seventh Circuit as to the obviously difficult question of state law there involved (309 U. S. at 481, 484). In the *Magnolia* case, the bankruptcy court was directed to order the trustee in bankruptcy to file plenary proceedings to determine title in a state litigation necessarily complete in itself. There, unlike here, the

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IV.

Even if the court below erred as to Louisiana law, Louisiana law is in any event not governing on the issue of enforceability.

Shell's attack on the decision below is based solely on some purported anomaly of Louisiana law. The Petition does not question the correctness of the decision under the law of any other jurisdiction or under contract doctrine generally.

As we have shown, Shell's contention that the court below misapplied Louisiana law is without merit. However, even if the court below erred as to Louisiana law, this is irrelevant. Shell's theory of why Louisiana law governs is in error, and this is an added reason, although none is needed, why its position is untenable.

Contrary to Shell's view, federal law would govern the matter of the enforceability of the Atlantic contract and its price-fixing provisions. On the specific question of whether the Atlantic arbitration provision would be enforceable and the manner of its enforcement, should there be any occasion prior to the arbitrators' decision to seek judicial assistance for its self-operating provisions, the Federal Arbitration Act would apply (9 U. S. C. §§1-14). That Act makes arbitration provisions fully "valid, irrevocable and enforceable" (9 U. S. C. §2). The Act expressly

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court through the trustee in bankruptcy had control of the issues to be raised in the state court proceeding. There, unlike here, the court could be sure there would be a decision by the state court on the very issue which it wished decided. There, unlike here, there was no possibility of a conflict with the state court on issues on which it was not intended to have the state court pass. Also, unlike the instant case which involves the price of gas in interstate commerce, the question referred in the *Magnolia* case related to a purely intrastate matter.

provides that it covers "any contract evidencing transactions involving commerce" (9 U. S. C. §2). See *Tenney Engineering, Inc.* v. *United Electrical Workers,* 207 F. 2d 450, 454 (3d Cir. 1953). The Atlantic contract is a contract evidencing a transaction involving "commerce" under the decision of this Court in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672, and the arbitration clause is therefore governed by and fully enforceable under the Federal Arbitration Act. See *Kentucky River Mills* v. *Jackson,* 206 F. 2d 111, 117 (6th Cir. 1953), *cert. denied,* 336 U. S. 887.

Among other reasons why federal law and the Federal Arbitration Act would determine the obligations of the Atlantic contract is that the Defense Plant Corporation, an instrumentality of the Government, was originally a party to the contract. It is established doctrine that, when the United States Government is a party to a contract, the rights and duties of the parties are fixed by federal law. *Clearfield Trust Co.* v. *United States,* 318 U. S. 363. See also *United States* v. *County of Allegheny,* 322 U. S. 174. When Texas Gas became a party to the Atlantic contract by assignment, it succeeded, as assignor, to the rights and duties of the Government under the contract and federal law continued to govern (Items E-H, R. 267, 280-83, 286-87). *American Houses* v. *Schneider,* 211 F. 2d 881, 882-83 (3d Cir. 1954). See also *Bank of America* v. *Parnell,* 352 U. S. 29, 34.

But even if we assumed, *arguendo,* both (1) that there was any merit to Shell's argument as to the result of applying Louisiana law and (2) that federal law is inapplicable, this would not help Shell. If federal law does not apply, the law of Louisiana still would not govern. In that event, the law of the District of Columbia would apply. That is the jurisdiction in which the Atlantic contract was

executed by the purchaser and thereby became binding, the contract having been earlier executed by the seller in Texas (Item E, R. 279). The authorities (including those of Louisiana) are generally in accord that the place of making of a contract controls the kind of question raised here, namely, whether an obligation is legally binding.* E. g., *Restatement, Conflict of Laws* §§ 332, 346 (1934); 2 Beale, *Conflict of Laws* §332.4 (1935); Goodrich, *Conflict of Laws* §§110, 154 (3d ed 1949); Goodrich, *Yielding Place to New: Rest Versus Motion in the Conflict of Laws,* 50 Colum. L. Rev. 881, 896-97 (1950); *Moore* v. *Burdine,* 174 So. 279, 281 (La. App. 1937); *Campbell Soup Co.* v. *Wentz,* 172 F. 2d 80, 81 (3d Cir. 1948). See also Art. 10, La. Civ. Code.

Conclusion.

Shell has had more than its day in court. This case has been to the decisional level a total of five times. Shell

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* Shell is apparently contending, among other things, that Louisiana law is applicable because it is "the place where all material factors attending the Atlantic contract take place" (Petition, p. 12). Even if such an approach were justified, it would not result in the application of Louisiana law. Not only is Louisiana not the place of execution by either party or delivery of the contract, both obviously "material factors attending the Atlantic contract", but, in addition, Atlantic supplies an *interconnected interstate* pipeline system with gas. Moreover, the parties who executed the Atlantic contract in 1943—who were not Louisiana corporations, who did not have their principal offices in Louisiana, who did not execute the contract in Louisiana and who did not deliver the contract in Louisiana—certainly had no intention that Louisiana law or some purported anomaly of Louisiana law would govern the Atlantic contract or nullify the obligation to supply gas for the life of the contract (Item E, R. 267, 278, 279).

is now asking this Court for a sixth decision on issues which are purely commercial and private in nature. We submit that this Court should finally put this litigation to rest and deny the petition for a writ of certiorari.

Respectfully submitted,

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October 11, 1961